TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 86

LOUIS ZEMEL, Appellant,

vs.

DEAN RUSK, SECRETARY OF STATE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

FILED MAY 15, 1964
JURISDICTION POSTPONED OCTOBER 12, 1964

SUPREME COURT OF THE UNITED STATES

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 29, 1964

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[fol. 9] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

LOUIS ZEMEL, Powder Hill Road, Middlefield, Connecticut, Plaintiff,

v.

DEAN RUSK, Secretary of State, Department of State, Washington, D.C. and ROBERT F. KENNEDY, Attorney General, Washington, D.C., Defendants.

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION—Filed April 20, 1963

The plaintiff, Louis Zemel, by his attorneys, complaining of the defendants, Dean Rusk, Secretary of State, and Robert F. Kennedy, Attorney General, alleges as follows:

1. The Court has jurisdiction of this action under Section 10 of the Administrative Procedure Act, 5 U.S.C. Section 1009; and under Title 28 U.S.C. Sections 1391 and 2201. One of the purposes of this action is to enjoin the enforcement and execution of certain acts of Congress for repugnance to the Constitution. Hence, a three-judge Court is required to be convened under 28 U.S.C. Sections 2282 and 2284.

2. Plaintiff is a citizen of the United States, residing in Middlefield, Connecticut.

[fol. 10] 3. The defendant, Dean Rusk, is Secretary of State of the United States, and is charged by law with the duty of issuing passports in the United States.

4. The defendant, Robert F. Kennedy, is Attorney General of the United States and is charged by law with the duty of regulating departure from and entry into the United States.

5. Plaintiff is the holder of a valid United States passport of standard form and duration.

6. On January 16, 1961, the defendant Secretary of State announced publicly and formally ruled that United States passports are invalid for travel to Cuba unless such passports are specifically endorsed by him for such travel. The said announcement was made in Press Release No. 24 of the Department of State.

7. On January 16, 1961, the defendant Secretary of State, through his Deputy Under-Secretary for Administration, issued Public Notice 179, 26 F.R. 492 (January 19, 1961), which stated that "all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba" and "Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked."

8. On January 16, 1961, the defendant Secretary of State issued Departmental Regulation 108.456, which was pub- [fol. 11] lished on January 19, 1961 (26 F.R. 482-483), which amended 22 CFR 53.3(b), and which exempted Cuba from those countries in the Western Hemisphere for which a passport is not required of United States citizens by the defendant Secretary of State.

9. The said restrictions upon travel to Cuba are purportedly based upon the President's powers under (i) Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185, (ii) the Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. 211a, (iii) Sections 124 and 126 of Executive Order 7856, 3 F.R. 681, 687, 22 CFR 51.75, 51.77, and (iv) Proclamation 3004, 18 F.R. 489 issued on January 17, 1953, the said Proclamation being based upon the alleged existence of a national emergency arising principally from the Korean War. In addition, the defendant Secretary of State has claimed the existence of an "inherent executive power" to restrict and prevent such travel.

10. Upon information and belief, the defendant Secretary of State has publicly announced and privately advised individuals that criminal proceedings against United States citizens traveling to Cuba and not possessing the said endorsements in their passports would be instituted. In at least one such case, the defendant Attorney General recently instituted a criminal prosecution against an American citizen on the ground that his entry into the United States from Cuba without a passport validated as set forth [fol. 12] above constitutes a violation of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185.

11. Upon information and belief, the restrictions and sanctions set forth in paragraphs "9" and "10" above have caused common carriers to refuse to carry United States citizens not bearing United States passports with the special endorsement referred to in paragraph "7" above, and have caused foreign governments to refuse to permit the departure of American citizens from their territories for Cuba under similiar circumstances.

12. On March 31, 1962 and thereafter, the plaintiff requested the defendant Secretary of State to validate his passport for travel to Cuba. Such requests were rejected by defendant on April 18, 1962 and thereafter.

13. On May 1, 1962, the plaintiff requested that the defendant Secretary of State give him a hearing in connection with the said defendant's refusal to validate plaintiff's passport for travel to Cuba. On May 9, 1962, the said defendant, citing 22 CFR 51.170 advised the plaintiff that the State Department's hearing procedures were not available in cases of this kind.

14. The actions of the defendants in this case are unlawful in that:

(a) The Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a, does not authorize the defendants to prevent by denial of passport facilities or by threat of civil or criminal sanctions or otherwise, the travel of an American citizen [fol. 13] to or in any part of the world.

(b) Section 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185, does not authorize the defendants to prohibit the travel of United States citizens to or in countries specified by the said defendants or make illegal the departure from the United States to any country whatsoever of American citizens bearing valid passports.

(c) The denial of the right to travel is an interference with plaintiff's right as a citizen and resident of the United States to freedom of speech, belief and association under the First Amendment to the Constitution of the United States, and his right to travel under the Fifth, Ninth and Tenth Amendments, and is so arbitrary and unreasonable as to deny plaintiff due process under the Fifth Amendment.

(d) The Korean War which was the basis for Proclamation 3004 of January 17, 1953 terminated more than eight years ago. The said Proclamation is accordingly inoperative as a matter of law, and there is in fact no emergency existing at the present time which could rationally justify the exercise of controls by the defendants over the travel of American citizens to and from the Republic of Cuba.

15. The Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a and Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185, are unconstitutional both on their face and as applied because (a) on their face, they interfere with plaintiff's rights as set forth [fol. 14] in paragraph 14(c); and (b) they are construed and applied to prevent travel even in the absence of an actual emergency; and (c) they contain no standards and are therefore an invalid delegation of legislative power.

16. The defendant Secretary of State's regulations and announcements as set forth in paragraphs "6" through "8" above are invalid for the additional reason that Executive Order 7856 and Proclamation 3004 fail to contain any standards to guide the Secretary of State in promulgating the said regulations and to guide the American citizen in determining whether the regulations are supported by statute or proclamation.

17. The plaintiff has exhausted his administrative remedies.

18. The actions of the defendants in denying the plaintiff the passport facilities sought, in obstructing plaintiff's departure from the United States to Cuba, in interfering with his travel, and in threatening the imposition of criminal and civil proceedings are causing plaintiff irreparable injury for which he has no adequate remedy at law.

Wherefore, plaintiff prays for a judgment,

(a) Decreeing that plaintiff is entitled under the Constitution and laws of the United States to travel to Cuba and to have his passport properly validated for that purpose;

[fol. 15] (b) Decreeing that plaintiff's travel to Cuba and his use of the passport for that purpose will not constitute a violation of the passport laws of the United States, or of the Immigration and Nationality Act of 1952, or of the State Department's rules and regulations, or of the terms and conditions of his passport;

(c) Decreeing that the defendant Secretary of State's restrictions upon travel to Cuba, as embodied in his public announcement of January 16, 1961, Press Release No. 24, in Public Notice 179, 26 F.R. 492, and in Departmental Regulation 108.456, 26 F.R. 482-483, are invalid, without any authority in law, and are unsupported by the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a, or by Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185, or by Proclamation 3004, 18 F.R. 489;

(d) Decreeing that the Passport Act of 1926, *supra*, and Section 215 of the Immigration Act of 1952, *supra*, are unconstitutional, and enjoining the defendants from carrying out or enforcing the said statutes, as aforesaid;

(e) Decreeing that the defendant Secretary of State's refusal to afford passport facilities to plaintiff so that he may go to Cuba is in violation of plaintiff's rights under the statutes and Constitution of the United States and the Declaration of Human Rights of the United Nations;

(f) Decreeing that the denial of the said passport endorsement and validation to plaintiff without a formal hearing at which evidence is adduced to show how the national security would be affected adversely by plaintiff's [fol. 16] proposed trip to Cuba, violates plaintiff's rights to due process under the Fifth Amendment to the Constitution;

(g) Directing the defendant Secretary of State to validate plaintiff's passport for travel to and from Cuba;

(h) Enjoining the defendants from interfering with plaintiff's travel to Cuba, and from taking any adverse action whatsoever against plaintiff by way of passport cancellation, denial of future passport facilities, institution of criminal proceedings, advice or instructions to other governments and to common carriers, or other actions against the plaintiff by reason of his prospective travel to Cuba and such travel when consummated;

(i) And for such other and further relief as may be just and proper.

Rabinowitz & Boudin, By Leonard B. Boudin, Member of Firm, 30 East 42nd Street, New York 17, New York;

Gruber & Turkel, By Samuel Gruber, Member of Firm, 322 Main Street, Stamford, Conn.

Attorneys for Plaintiff.

So Ordered:

Robert J. Anderson, J., United States District Court.

Certificate of service (omitted in printing).

[fol. 21] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

[Title omitted]

ANSWER TO AMENDED COMPLAINT—Filed May 6, 1963

Now come the defendants, by their attorneys, in answer to the amended complaint herein filed, and say:

First Defense

1. The defendants deny the allegations contained in Paragraph 1 of the amended complaint.

2. The defendants admit the allegations contained in Paragraph 2 of the amended complaint.

3. Answering Paragraph 3 of the amended complaint, the defendant Dean Rusk admits that he is the Secretary of State of the United States and that he has the authority to grant and issue United States passports. This defendant denies the other allegations contained in Paragraph 3 of the amended complaint.

4. The defendants deny the allegations contained in Paragraph 4 of the amended complaint.

5. The defendant Secretary of State admits the allegations contained in Paragraph 5 of the amended complaint.

[fol. 22] 6. Answering Paragraph 6 of the amended complaint, the defendant Secretary of State admits that on January 16, 1961, he issued Press Release No. 24, which stated that travel to Cuba by American citizens was forbidden unless their passports were specifically endorsed or validated for such travel.

7-8. The defendant Secretary of State admits the allegations contained in Paragraphs 7 and 8, inclusive of the amended complaint.

9. Answering Paragraph 9 of the amended complaint, the defendant Secretary of State denies that the sources of his authority to place restrictions on travel by United States citizens to Cuba are limited to the particular statutes, proclamation, and executive order enumerated by the plaintiff, and further alleges that he also derives his authority aforesaid from the inherent power of the executive over foreign affairs.

10. Answering Paragraph 10 of the amended complaint, the defendant Secretary of State admits that the Department of State press releases have advised all concerned that travel to Cuba by a United States citizen without a passport specifically validated by the Department of State for that purpose constitutes a violation of the Travel Control Law and Regulations, a willful violation of which is punishable by fine and/or imprisonment. Further answering said paragraph, the defendant Attorney General of the United States admits that the United States Government [fol. 23] recently instituted criminal proceedings against one William Worthy, Jr., on the ground that he "did unlawfully, wilfully and knowingly enter the United States without bearing a valid passport, the said [William Worthy, Jr.] then and there having arrived from the Republic of Cuba, a place outside the United States for which a valid passport is required under 22 CFR 53.2 and 53.3. In violation of Section 1185(b), Title 8, United States Code." The defendant Secretary of State denies the other allegations contained in this paragraph.

11. The defendants deny the allegations contained in Paragraph 11 of the amended complaint.

12-13. The defendant Secretary of State admits the allegations contained in Paragraphs 12 and 13 of the amended complaint.

14-16. The defendants deny the allegations contained in Paragraphs 14 through 16, inclusive, of the amended complaint.

17. The defendants admit the allegations contained in Paragraph 17 of the amended complaint.

18. The defendants deny the allegations contained in Paragraph 18 of the amended complaint.

Second Defense

The amended complaint fails to state a claim upon which relief may be granted.

Third Defense

The court lacks jurisdiction over the subject matter of the amended complaint.

[fol. 24] *Fourth Defense*

Plaintiff, not coming within the exceptions contained in the announced policy of the Department of State with respect to travel to Cuba, is not eligible to have his passport validated for travel to Cuba, a country with which the United States does not maintain diplomatic relations.

Fifth Defense

The action of the defendant complained of is necessary to the conduct of foreign relations of the United States, is in compliance with the Constitution, applicable statutes, executive orders, proclamations, and regulations, and is not arbitrary, capricious, or an abuse of discretion.

Sixth Defense

The conduct and exercise of the foreign relations of the United States resides in the Executive Branch of the Government. Within the reasonable and proper exercise of foreign relations, the Executive may properly prevent travel by United States citizens to certain designated geographical areas of the world when necessitated by foreign policy considerations.

Seventh Defense

There is no legal basis or justification for the Court to enjoin the defendants from instituting criminal proceedings against the plaintiff should he commit a violation of law.

[fol. 25] Wherefore, the defendants, having fully answered the allegations contained in the numbered paragraphs of the amended complaint, pray that the amended complaint herein be dismissed, with costs taxed against the plaintiff.

Robert C. Zampano, United States Attorney; F. Kirk Maddrix, Attorney, Department of Justice; Benjamin C. Flannagan, Attorney, Department of Justice, Washington 25, D.C., Attorneys for Defendants.

Certificate of service (omitted in printing).

[fol. 26] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
Civil Action No. 9549

[Title omitted]

AMENDMENT TO ANSWER TO AMENDED COMPLAINT—
Filed May 10, 1963

The defendants, by their attorneys, hereby amend Paragraph 4 of their answer to the amended complaint to read as follows:

"4. Answering Paragraph 4 of the amended complaint, the defendants admit that Robert F. Kennedy is the Attorney General of the United States and deny the other allegations contained therein."

Robert C. Zampano, United States Attorney; F. Kirk Maddrix, Attorney, Department of Justice; Benjamin C. Flannagan, Attorney, Department of Justice, Washington 25, D.C., Attorneys for Defendants.

[fol. 27] Certificate of service (omitted in printing).

[fol. 29] [File endorsement omitted]

[fol. 30]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

[Title omitted]

REQUEST FOR A THREE-JUDGE COURT—Filed July 12, 1963

Comes now the plaintiff in the above-entitled case and upon the amended complaint herein, the answer thereto, the amended answer, plaintiff's motion for summary judgment and plaintiff's supporting affidavit sworn to April 15, 1963, suggests to the Court the necessity for convening a three-judge court in conformity with 28 U.S. Code, Sections 2282 and 2284 for the reason that plaintiff seeks to restrain the enforcement and execution of two Acts of Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S. Code, Sections 211-a and 215, and the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S. Code, Section 1185, for repugnance to the Constitution of the [fol. 31] United States.

Rabinowitz & Boudin, By Leonard B. Boudin, Member of Firm, 30 East 42nd Street, New York 17, New York.

Gruber & Turkel, By Samuel Gruber, Member of Firm, 322 Main Street, Stamford, Connecticut.

[fol. 32] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

[Title omitted]

MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF—
Filed July 12, 1963

Now comes the plaintiff by his attorneys and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves the Court to enter summary judgment for the plaintiff on the ground that there is no genuine issue as to any material fact, and the plaintiff is entitled to judgment as a matter of law.

In support of this motion, plaintiff refers to the record herein including the amended complaint, the answer thereto, the defendants' amendment to the answer, and plaintiff's annexed affidavit sworn to the 15th day of April, 1963.

Rabinowitz & Boudin, By Leonard B. Boudin, Member of Firm, 30 East 42nd Street, New York 17, New York;

[fol. 33]

Gruber & Turkel, By Samuel Gruber, Member of Firm, 322 Main Street, Stamford, Conn.;

Attorneys for Plaintiff.

[fol. 34]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

[Title omitted]

AFFIDAVIT OF LOUIS ZEMEL—April 15, 1963

Louis Zemel, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action. I make this affidavit in support of my motion for summary judgment in the said action.

2. I have read the amended complaint filed in this action and I know the contents thereof. All of the facts alleged in the complaint are true, and I incorporate them in this affidavit.

3. I have been in correspondence with the Department of State in connection with my desire to travel to Cuba. The most significant of such correspondence is attached hereto as Exhibits through .

4. I desire to travel to Cuba for the purposes indicated [fol. 35] in this correspondence. I believe that I am entitled under the Constitution of the United States to make such a trip.

5. Upon the amended complaint, this affidavit and the proceedings heretofore had herein, I respectfully ask that this Court enter a summary judgment in my favor for the relief prayed for in the complaint.

Louis Zemel

Sworn to before me this 15th day of April, 1963.

Sophie Edwin, Notary Public, State of New York, No. 24-6153600, Qualified in Kings County, Commission Expires March 30, 1964.

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* CLERK'S NOTE—The correspondence referred to is that attached to the affidavit of Miss Frances G. Knight printed on pages 20-31, infra.

[fol. 36] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
Civil Action No. 9549

LOUIS ZEMEL, Powder Hill Road, Middlefield, Connecticut,
Plaintiff,

v.

DEAN RUSK, Secretary of State, Department of State,
Washington, D. C., Defendant.

DESIGNATION OF JUDGES—Filed September 13, 1963

Having been notified by the Honorable M. Joseph Blumenfeld, United States District Judge for the District of Connecticut, that an application has been filed in the above matter for relief pursuant to Title 5 United States Code Section 1009 and Title 28 United States Code Sections 1361 and 2201 for an order enjoining the enforcement and execution of certain acts of Congress for repugnance to the Constitution, pursuant to Title 28 United States Code Section 2284 I hereby designate the following judges, in addition to the Honorable M. Joseph Blumenfeld, to hear and determine said cause as provided by law: Honorable J. Joseph Smith, United States Circuit Judge and Honorable T. Emmet Clarie, United States District Judge for the District of Connecticut.

It Is Hereby Ordered that this order be filed in the above entitled cause in the said District Court.

J. Edward Lumbard, Chief Judge, United States Court of Appeals for the Second Circuit.

Dated: New York, N. Y., September 11, 1963.

[fol. 37] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

[Title omitted]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT—
Filed November 13, 1963

Come now the defendants, the Secretary of State of the United States and the Attorney General of the United States, by their attorneys, and respectfully move this Honorable Court for summary judgment pursuant to the provisions of Rule 56, F.R. Civ. P., on the grounds that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law.

In support of this motion the Court's attention is respectfully invited to the defendants' memorandum of points and authorities and to the affidavit of Knight, both attached hereto. A separate statement of material facts is also attached.

Robert C. Zampano, United States Attorney; Benjamin C. Flannagan, Attorney, Department of Justice, Washington, D.C., Attorneys for Defendants.

[fol. 38] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

[Title omitted]

DEFENDANTS' STATEMENT OF MATERIAL FACTS—
Filed November 13, 1963

The defendants respectfully assert that there is no genuine issue as to the following material facts:

1. There currently exists in this country a national emergency proclaimed by the President. Proclamation 3004, 67 Stat. C31.

2. A passport is now required of United States citizens for travel to Cuba. 8 U.S.C. 1185 and 22 C.F.R. 53.3.

3. United States passports are currently not valid for travel to Cuba unless specifically validated for such travel. They are validated only for persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests. Public Notice 179, 26 F.R. 492; Press Release No. 24, dated January 16, 1961.

4. Plaintiff, the holder of a passport, applied for validation thereof for travel to Cuba on March 31, 1962 on the ground that he "should like very much to visit Cuba this summer as a tourist." Affidavit of Knight.

[fol. 39] 5. On April 18, 1962 plaintiff's application was denied on the ground that tourist travel to Cuba is not regarded as travel which would be in the best interests of the United States and that his letter of March 31, 1962 did "not present evidence of a compelling nature that would justify the validation of a passport for travel to Cuba at this time." Affidavit of Knight.

6. On May 1, 1962 plaintiff requested a hearing on the denial of his application for validation and this request was denied on May 9, 1962. Affidavit of Knight.

7. Plaintiff filed this action on December 7, 1962.

Robert C. Zampano, United States Attorney; Benjamin C. Flannagan, Attorney, Department of Justice, Washington, D.C., Attorneys for Defendants.

[fol. 40] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

LOUIS ZEMEL, Plaintiff,

v.

THE SECRETARY OF STATE, Defendant.

AFFIDAVIT—Filed November 18, 1963

City of Washington,
District of Columbia, ss:

Frances G. Knight, being duly sworn, deposes and says:

1. That on May 1, 1955, she was duly appointed the Director of the Passport Office of the Department of State; that she has continued to serve as the Director since that time, and that she has personal knowledge of the matters related in this affidavit;

2. That the attached copies of Public Notice 179 (F. R. Doc. 61-505 filed January 18, 1961) and Department of State Regulation 108.456 (F. R. Doc. 61-506 filed January 18, 1961) are true copies of the originals which appeared in the January 19, 1961 issue of the Federal Register;

3. That the attached copy of Department of State Press Release No. 24 of January 16, 1961 is a true copy of the original which was released on that date;

[fol. 41] 4. That she is the legal custodian of all official records of the Passport Office of the Department of State;

5. That the attached copies of correspondence, identified below, relating to Louis Zemel are true copies of the originals contained in the official records of the Passport Office, Department of State:

(a) Letter of March 31, 1962 to Miss Frances G. Knight, Director, Passport Office from Louis Zemel.

(b) Letter of April 18, 1962 to Mr. Louis Zemel from Edward J. Hickey, Acting Director, Passport Office.

(c) Letter of May 1, 1962 to Miss Frances G. Knight, Director, Passport Office from Louis Zemel.

(d) Letter of May 9, 1962 to Mr. Louis Zemel from Robert D. Johnson, Acting Deputy Director, Passport Office.

(e) Letter of May 21, 1962 to Robert D. Johnson, Esquire, Acting Deputy Director, Passport Office from Louis Zemel.

(f) Letter of June 4, 1962 to Mr. Louis Zemel from Robert D. Johnson, Acting Deputy Director, Passport Office.

(g) Letter of October 9, 1962 to Miss Frances G. Knight, Director, Passport Office from Leonard B. Boudin, Attorney At Law.

(h) Letter of October 17, 1962 to Mr. Leonard B. Boudin, Attorney At Law from Edward J. Hickey, Deputy Director, Passport Office.

(i) Letter of October 30, 1962 to Mr. Edward J. Hickey, Deputy Director, Passport Office from Louis Zemel.

[fol. 42] (j) Letter of November 5, 1962 to Mr. Louis Zemel from Edward J. Hickey, Deputy Director, Passport Office.

6. That since April 1, 1963, all passports issued by the Department of State have contained the following restrictions:

This Passport is not valid for travel to or in Communist controlled portions of

China
Korea
Viet-Nam

Or to or in

Albania
Cuba

A person who travels to or in the listed countries or areas may be liable for prosecution under Section 1185, Title 8, United States Code, and Section 1544, Title 18, United States Code.

Frances G. Knight

Sworn to before me this 12 day of November, 1963.

(Seal)

Elizabeth F. McCormack, Notary Public. My Commission expires September 30, 1965.

[fol. 43]

ATTACHMENT TO AFFIDAVIT

FEDERAL REGISTER

January 19, 1961

[Dept. Reg. 108.456]

PART 53—TRAVEL CONTROL OF CITIZENS AND NATIONALS IN TIME OF WAR OR NATIONAL EMERGENCY

Exceptions to Regulations

Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, dated March 31, 1938, issued under the authority of section 1 of the act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), and section 4 of the act of May 26, 1949 (63 Stat. 111; 5 U.S.C. 151c), I hereby amend paragraph (b) of 53.3, Exceptions to regulations in § 53.2 of Title 22 of the Code of Federal Regulations to read as follows:

§ 53.3 Exceptions to Regulations in 53.2.

* * * * * * *

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also,* That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(Sec. 215, 66 Stat. 190; 8 U.S.C. 1185 and Executive Order 3004 dated January 17, 1953, 18 F.R. 489.)

The regulation contained in this order shall become effective upon publication in the FEDERAL REGISTER. The provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) relative to notice of proposed rule making and delayed effective date are inapplicable to

this order because the provisions thereof involve foreign affairs functions of the United States.

Dated: January 16, 1961.

For the Secretary of State.

LOY W. HENDERSON,
Deputy Under Secretary for Administration.

[F.R. Doc. 61-506; Filed, Jan. 18, 1961; 8:54 a.m.]

DEPARTMENT OF STATE

[Public Notice 179]

UNITED STATES CITIZENS

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 FR 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 USC 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961.

For the Secretary of State.

LOY HENDERSON,
Deputy Under Secretary for Administration.

[F.R. Doc. 61-505; Filed, Jan. 18, 1961; 8:54 a.m.]

[fol. 44]

ATTACHMENT TO AFFIDAVIT

DEPARTMENT OF STATE

FOR THE PRESS

January 16, 1961 No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

• • • • • •

State—RD, Wash., D. C.

[fol. 45] ATTACHMENT TO AFFIDAVIT

(Letterhead of Powder Hill, Ski Area Cabana Club, Zemel Bros., Inc., Middlefield, Connecticut.)

March 31, 1962

Miss Frances G. Knight
Director, Passport Office
Department of State
Washington, D. C.

[Stamp—Passport office, Cor-3, Apr. 9, 1962, Correspondence and Review Staff]

[Handwritten notation—Ans by White, LP 4/9/62]

Dear Miss Knight:

I should like very much to visit Cuba this summer as a tourist. I understand that it is necessary to obtain special permission for this trip from the State Department. I presently hold passport Number 1256609 issued October 22nd, 1958 and renewed November 14th, 1960.

Would you be good enough to advise me as to the procedure to be followed to have my passport validated for travel to Cuba?

Sincerely yours,

/s/ LOUIS ZEMEL
Louis Zemel; Ig

[fol. 46] ATTACHMENT TO AFFIDAVIT

[Handwritten notation—PT/DA]
In reply refer to Apr 18 1962

C130—Zemel, Louis

Dear Mr. Zemel:

I refer to your letter of March 31, 1962, requesting information regarding a validation for travel to Cuba.

You will see from the enclosed press release that passports are now required for travel to Cuba, and that they are only issued to persons whose travel may be in the best

interests of the United States, such as, newsmen and businessmen with previously established interests. Tourist travel is excluded.

Your letter does not present evidence of a compelling nature that would justify the validation of a passport for travel to Cuba at this time.

Sincerely,

J. McFubb

Enclosure:
Press Release.

Edward J. Hickey
Acting Director, Passport Office

Mr. Louis Zemel,
Powder Hill Cabana Club,
Powder Hill Road,
Middelfield, Connecticut.

[fol. 47] ATTACHMENT TO AFFIDAVIT

(Letterhead of Powder Hill, Ski Area Cabana Club, Zemel Bros., Inc., Middlefield, Connecticut.)

May 1, 1962

[Handwritten notation—PT]

Miss Frances G. Knight
Director, Passport Office
Department of State
Washington, D. C.

Dear Miss Knight:

On March 31st I sent a letter, copy enclosed, asking for special permission to visit Cuba.

This request has been refused by the State Department.

I should like to request a hearing on this application in as much as I feel justified in wanting to make the trip.

Can you advise the date on which such a hearing can be scheduled?

Very truly yours,

Louis Zemel
/s/ LOUIS ZEMEL

LZ:I

[fol. 48]

ATTACHMENT TO AFFIDAVIT

In reply refer to May 9 1962

PT/LS 130—Zemel, Louis

Dear Mr. Zemel:

We refer to your letter of May 1, 1962, requesting a hearing in the matter of the Department's refusal to validate your passport for travel to Cuba.

In our letter of April 18, 1962, you were advised that American citizens must have their passports specifically validated for travel to Cuba and that validations were granted only to persons whose travel was considered in the best interests of the United States, such as, newsmen and businessmen with previously established business interests. You were further advised that the reasons given by you for travel to Cuba did not meet these criteria.

The general restriction on the travel by American citizens to Cuba and individual action denying the validation of a passport for travel to Cuba are based upon foreign policy considerations and consequently do not raise any issues for determination by the administrative procedures established in the Department. Enclosed for your information is a copy of the Department's Regulations which outline the administrative procedures available in cases involving adverse passport action. You will note in Section 51.170 of these Regulations that actions taken by reason of geographical limitations of general applicability necessitated by foreign policy considerations are excepted from the review and appeal procedures.

The authority of the Chief Executive of the United States acting through the Secretary of State to promulgate general geographical restrictions on the travel of American

Mr. Louis Zemel,
Powder Hill Cabana Club,
Powder Hill Road,
Middlefield, Connecticut.

[fol. 49] citizens when foreign policy considerations so dictate was upheld in the case of Worthy vs. Herter 270 F 2d 905 decided in 1959 (certiorari denied by the Supreme Court). The authority to make exceptions to these general restrictions and to establish reasonable criteria for granting such exceptions was upheld in Frank vs. Herter 269 F 2d 245 and Porter vs. Herter 278 F 2d 280.

Although, under the circumstances set forth above, the Department's administrative procedures are not available to you, we would, of course, be happy to discuss the matter informally with you. If you wish us to schedule an interview for you, please let us know.

Sincerely,

/s/ R. D. J.

Robert D. Johnson
Acting Deputy Director
Passport Office

Enclosure:

Copy of Regulations

[fol. 50] ATTACHMENT TO AFFIDAVIT

(Letterhead of Powder Hill, Ski Area Cabana Club, Zemel Bros., Inc., Middlefield, Connecticut.)

May 21, 1962

Robert D. Johnson, Esq.
Acting Deputy Director
Passport Office
Department of State
Washington 25, D. C.

Dear Mr. Johnson:

I thank you for your letter of May 9th.

I would appreciate your advising me as to the exceptions to the general restrictions on the travel of American Citizens to Cuba.

Would you be good enough to send me an actual copy of the reguiations and rules spelling out those exceptions.

After reading them, I shall then be in a position to determine whether to accept your kind offer for an interview.

Sincerely yours,

/s/ Louis Zemel
Louis Zemel:ig

[Stamp—Passport office, May 22, 1962 PT/L RDJ]

[Stamp—Passport office, June 1, 1962 PT/LS]

[fol. 51]

ATTACHMENT TO AFFIDAVIT

In reply refer to Jun 4 1962

PT/LS 130—Zemel, Louis

[Handwritten notation—6/21/62 File GB PT/LS]

Dear Mr. Zemel:

We refer to your letter of May 21, 1961, concerning your request for the validation of your passport for travel to Cuba.

The criteria for granting exceptions to the general restriction on travel to Cuba are basically those set forth in the second paragraph of our letter of May 9, 1962. However, a copy of the Department's Press Release of January 16, 1961, announcing the restriction is enclosed for your information.

Sincerely,

/s/ RDJ/CHS

Robert D. Johnson
Acting Deputy Director
Passport Office

Enclosure:

Copy of Press Release of
January 16, 1961

Mr. Louis Zemel,
Powder Hill Cabana Club,
Powder Hill Road,
Middlefield, Connecticut.

[fol. 52]

ATTACHMENT TO AFFIDAVIT

(Letterhead of Rabinowitz & Boudin, 30 East 42nd Street, New York 17, N. Y.)

[Stamp—Passport office Oct 11 1962 PT/L]

[Handwritten notation—PT/LAD R. Johnson]

October 9, 1962

Miss Frances G. Knight,
Director, Passport Office
Passport Office, Department of State
Washington, D. C.

Att: Robert D. Johnson, Esq.,
Acting Deputy Director

Dear Miss Knight:

In prior correspondence with our client, Mr. Louis Zemel, your office declined to validate his passport for travel to Cuba and advised him that the Department's administrative procedures were not available for purposes of review.

Since Mr. Zemel has now received a new passport and still desires such validation, would you regard this as a renewed request for validation and for review. I assume that the response of the Department will be the same and I merely make this request so that in the event of ultimate litigation, no suggestion of mootness will be made.

I shall appreciate your reply.

Sincerely yours,

/s/ LEONARD B. BOUDIN
Leonard B. Boudin

LBB:se

[Stamp—Passport office Oct 15 1962 PT/LAD]

[fol. 53] ATTACHMENT TO AFFIDAVIT

In reply refer to Oct 17 1962

PT/LAD—130—Zemel, Louis

Dear Mr. Boudin:

We refer to your letter of October 9, 1962 requesting validation of Mr. Louis Zemel's passport for travel to Cuba.

We have reviewed Mr. Zemel's passport file and note that he applied for validation of his passport for travel to Cuba on March 31, 1962. His application was refused at the time because the reason he gave for his travel to Cuba did not come within established criteria.

In view of the time elapsed since Mr. Zemel's past application and the current reasons Mr. Zemel may have for travel, we suggest that he formally apply for validation of his passport for travel to Cuba. The application should be in writing and must contain the following information:

1. Purpose of trip.
2. Expected duration of stay in Cuba.
3. Address while in Cuba.
4. Assurance that he will register with the Consulate of Switzerland, Havana, upon arrival in that city.

Upon receipt of Mr. Zemel's application, prompt consideration will be given to his request for validation.

Sincerely,

/s/ EJH

Edward J. Hickey
Deputy Director, Passport Office

Mr. Leonard Boudin,
Attorney-at-Law,
30 East 42nd Street,
New York 17, New York.

[Handwritten notation—Copy given Mr. Hickey by FGK 10-17-62]

[Stamp—Legal Division, cc ..... Subject; cc ..... Tickler; cc √ Chron; cc .....]

[fol. 54]

ATTACHMENT TO AFFIDAVIT

October 30, 1962

Mr. Edward J. Hickey
Deputy Director, Passport Office
Department of State
Washington, D. C.

[Stamp—Passport office Nov 2 1962 PT/L]

Dear Mr. Hickey:

I am replying to your letter of October 17 to Mr. Boudin regarding validation of my passport for travel to Cuba.

Please consider this letter as a current application for such validation.

The purpose of my trip would be to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen. I would expect to stay in Cuba for approximately two to three weeks. My address while in Cuba would be the Havana Libre Hotel. I am perfectly willing to register with the consulate of Switzerland in Havana upon arrival in that city.

I would appreciate a prompt consideration of this request.

Sincerely,

/s/ LOUIS ZEMEL
LZ:i

Louis Zemel
Pease Road
Woodbridge, Conn.

[Passport office—Nov 1 1962 PT/DA]

[fol. 55]

ATTACHMENT TO AFFIDAVIT

In reply refer to PT/L

Nov 5 1962

[Handwritten notation—PD 11-5-62]

Dear Mr. Zemel:

Reference is made to your letter of October 30, 1962, requestioning validation of your passport for travel to Cuba.

You state that the purpose of your travel is "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen."

Our records show that you have been informed by letters dated April 18, 1962, May 9, 1962, and June 4, 1962, of the criteria, the regulatory and legal authority concerning the travel to Cuba by United States citizens. The criteria set out in the Department of State Press Release of January 16, 1961, a copy of which has been furnished to you are still in effect.

It is obvious that your present purpose of visiting Cuba does not meet the standards for validation of your passport.

Sincerely,

/s/ EJH
Edward J. Hickey
Deputy Director, Passport Office

Mr. Louis Zemel,
Pease Road,
Woodbridge, Connecticut.

cc: Mr. Leonard B. Boudin

[fol. 59] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 9549

LOUIS ZEMEL, Plaintiff,

v.

DEAN RUSK, Secretary of State, Department of State, and ROBERT F. KENNEDY, Attorney General, Defendants.

MEMORANDUM OF DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT—February 20, 1964

The plaintiff, a citizen of the United States and residing within this judicial district, has brought this action against Dean Rusk, Secretary of State of the United States and Robert F. Kennedy, the Attorney General of the United States for a declaratory judgment and to enjoin the enforcement and execution of two acts of Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211(a) and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185, both of which the plaintiff claims are repugnant to the Constitution. Jurisdiction of this Court is invoked under Section 10 of the Administrative Procedure Act. 60 Stat. 243 (1946). 5 U.S.C. § 1009 and 28 U.S.C. §§ 1391 and 2201; and pursuant to 28 U.S.C. §§ 2282 and 2284 a three-judge court was convened to pass upon the constitutional questions in issue.

Cross motions have been filed by the respective parties, pursuant to Rule 56, Fed. R. Civ. P., for the entry of summary judgment based on the representation of both parties [fol. 60] that there exists in this case no genuine issue as to any material fact. Having heard the arguments of counsel for the respective parties and having considered their amended pleadings, affidavits, briefs and other papers on

file, the Court is of the opinion that the plaintiff's motion for summary judgment should be denied and the defendants' motion for summary judgment should be granted.

The material facts are undisputed. On March 31, 1962, while the plaintiff was the holder of a valid United States passport of standard form and duration, he applied by letter to the Director of the Passport Office at Washington, D.C., for permission to have his passport validated for travel to Cuba as a tourist. The Passport Office denied him the permission requested, with the explanation that only persons whose travel might be in the best interests of the United States, such as newsmen and businessmen with previously established interests, could be eligible; and specifically that tourist travel was excluded. Thereafter, on May 1, 1962, the petitioner requested a hearing on his application without reciting any new reason, except that he felt justified in wanting to make the trip. He was sent a copy of the current Administrative Procedures of the Passport Office and advised by the acting Deputy Director, citing 22 C.F.R. 51.170 (1958), that in those instances where foreign travel was restricted by geographical limitations, which were generally applicable to everyone, no administrative procedures for review or appeal were provided. Subsequently, on October 11, 1962, the petitioner through his attorney advised the Passport Office by letter, that the former had acquired a new passport and renewed petitioner's request for its validation and a review of any denial. The [fol. 61] department advised counsel that in view of the lapse of time, since filing the original application, a new application should be filed, setting forth the purpose of the trip, his expected duration in Cuba, his address while there and assurance of his willingness to register with the Swiss Consulate upon his arrival in Havana.

Thereupon, the petitioner filed a new application for validation, wherein he represented that the purpose of his trip to Cuba was to satisfy his curiosity about the state of affairs in Cuba in order to make him a better informed citizen. He represented further, that he expected to stay at the Havana Libre Hotel for approximately two or three weeks and expressed his willingness to register with the Swiss consulate upon his arrival in Havana.

On November 5, 1962, the petitioner was notified by the Deputy Director of the Passport Office that his "present purpose of visiting Cuba does not meet the standards for validation of your passport." It should be emphasized that at the time of the Court's hearing on this motion, petitioner's counsel stated that he was making no claim of illegality on the basis of his client's not having been afforded an administrative hearing with reference to the denial of the passport validation and this Court will therefore consider that he has abandoned any claim of illegality on this ground, notwithstanding its recitation in the complaint.

It is the plaintiff's contention that the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211(a) does not authorize the action taken, that said Act and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185 are unconstitutional, because they interfere with [fol. 62] the rights of a citizen, in this instance the plaintiff, to the right to travel under the Fifth, Ninth and Tenth Amendments; to the freedom of speech, belief and association under the First Amendment and that it is an arbitrary and unreasonable denial of due process under the Fifth Amendment; further, that it is an invalid delegation of legislative power because it does not contain adequate standards and safeguards. The petitioner claims that Executive Order 7856 and Presidential Proclamation 3004 fail to provide adequate standards to guide the Secretary of State in promulgating the regulations and giving proper notice to the American citizen whether said regulations are supported by statute or proclamation; and to the extent that the denial rests upon Executive power over foreign relations, it is still subject to constitutional limitations, and the reasons given by the Secretary do not warrant this [illegible]idgement.

The plaintiff presently prays for a declaratory judgment and an injunction decreeing that § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185 and the Passport Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. § 211(a) are unconstitutional and that the Secretary of State's regulations,[1] restricting travel to Cuba are thus without any authority in law and are invalid as to

the plaintiff. He also requests that the Secretary of State be directed to validate the petitioner's passport for travel to Cuba, and that he and the Attorney General of the United States be enjoined from interference with his prospective travel or instituting any criminal procedure by reason thereof when consummated.

[fol. 63] The Three-Judge Court Issue

The preliminary jurisdictional question is whether this proceeding should be heard by a three-judge District Court pursuant to 28 U.S.C. § 2282. This statute requires such a tribunal as a prerequisite to the granting of any "interlocutory or permanent injunction restraining the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution. . . ." The necessary elements for the convocation of such a court are three-fold: (1) The complaint must allege a basis for equitable relief, *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963); (2) The constitutional question raised must be substantial. *Schneider* v. *Rusk,* 372 U.S. 224 (1963); and (3) The Complaint must assail an 'Act of Congress', *Jameson & Co.* v. *Morgenthau,* 307 U.S. 171 (1939).

A judgment for the plaintiff would put the operation of 22 U.S.C. § 211(a) and 8 U.S.C. § 1185 under the restraint of an equity decree. The constitutional claim is plainly substantial, for in *Kent* v. *Dulles,* 357 U.S. 116, 130 (1957) the Supreme Court said: "we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect." The Supreme Court's refusal to grant certiorari in three cases[2] involving geographic restrictions, all arising subsequent to *Kent* v. *Dulles,* supra, does not render the present claim insubstantial. The Court has frequently reiterated that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, ..." *United States* v. *Carver,* 260 U.S. 482, 490 (1922). See also Stern & Gressman, Supreme Court Practice § 5-7 (3d ed. 1962).

[fol. 64] The plaintiff claims, *inter alia,* that if §§ 211(a) and 1185 authorize the Secretary to place geographic limita-

tions upon the right to travel, they are unconstitutional by reason of an unlawful delegation of legislative power to the Executive. He argues that a reading of these sections shows that they are devoid of any standards or principles by which the Secretary is guided.

Inasmuch as this plaintiff seeks affirmatively to enjoin the operation of a passport regulatory system, the propriety of empaneling a three-judge tribunal is manifest. The legislative history of § 2282 indicates that it was enacted to prevent a single federal judge from paralyzing the operation of an entire administrative system by the issuance of a broad injunctive order.

> "Repeatedly emphasized during the congressional debates on § 2282 were the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law which could be wrought by a single judge's order, and the great burdens entailed in coping with harassing actions brought one after another to challenge the operation of an entire statutory scheme, wherever jurisdiction over government officials could be acquired, until a judge was ultimately found who would grant the desired injunction. 81 Cong. Rec. 479-481, 2142-2143 (1937)." *Kennedy* v. *Mendoza-Martinez*, supra, at 155.

This is truly a substantial constitutional challenge to the sovereignty of this Nation. This plaintiff's effort to enjoin the Secretary of State from enforcing the statutory law and its attendant regulations is not merely the simple and seemingly harmless application of a lone tourist; it is in fact a pilot case precedent, which if sustained, would open up an immediate thoroughfare for unrestricted travel [fol. 65] between the United States and Cuba. Such an act of judicial audacity would not only defeat the clear intention of Congress as established by law,[3] but also strike down the declared foreign policy of the Executive Branch of the National Government.[4] A substantial constitutional question is in issue. The fact that the statutes' validity and their attendant regulations are in this instance being up-

held, rather than nullified, does not alter the principle. *Bauer* v. *Acheson*, 106 F. Supp. 445, 452 (D.D.C. 1952).

All of the necessary elements are present to require that this matter be heard and determined by a three-judge court. 28 U.S.C. § 2282.

[fol. 66] Merits

The right of a citizen to travel is a part of the "liberty" of which he cannot be deprived, except by due process of law. This precept is recognized and guaranteed under the Fifth Amendment to the Federal Constitution.

> " . . . (T)he right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. . . . And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. . . . Where activities of enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." *Kent* v. *Dulles*, supra at 129.

The issue in this case is whether or not geographical passport restrictions imposed by the Secretary of State in respect to travel to Cuba are authorized by Congressional act and if so are those statutes which purport to grant such authority repugnant to constitutional limitations. It is this Court's finding that Congress has granted adequate authority to the Executive department to make these regulations, that their application in this instance does not violate due process and the statutes which authorize the regulations, 22 U.S.C.A. § 211(a) and 8 U.S.C.A. § 1185 are valid and constitutional.

In considering this constitutional issue the Court is acutely mindful of the separation of powers and that certain areas of government are relegated solely to Congress, others to the Executive and some are common to both. The Executive may act in certain fields until legislative action

[fol. 67] becomes operative and the law-making power then controls. Congress' right to lay statutory restrictions on the President when he treads such legislative ground is conceded unanimously by the Supreme Court; an ample safeguard is available if Congress chooses to apply it. Until Congress does so choose, "we (the Court) should hesitate long before limiting or embarrassing such powers." *Mackenzie* v. *Hare,* 239 U.S. 299, 311 (1915). The President is the active agent of the Nation, not of the Congress; and he derives that status directly from the Executive powers vested in him by the Constitution. U. S. Const. Art. II., §§ 1, 2, and 3. He must, of course, obey and carry out the laws enacted by Congress, not because he is subservient, but because the Constitution directs him to do so. Thus it becomes obvious that in certain areas of government the authority of the Legislative and Executive departments overlap; and a concurrent authority of both is cognizable.

> "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Youngstown Co.* v. *Sawyer,* 343 U.S. 579, 637 (1951) (concurring opinion).

The field of passport regulation and control cuts across the law-making functions of Congress and the Chief Executive's responsibility in the field of foreign affairs.

> "We think the designation of certain areas of the world as forbidden to American travelers falls within the power to conduct foreign affairs. The bare determination that certain areas outside this hemisphere are trouble spots, or danger zones, is a phase of 'foreign [fol. 68] affairs.' Such a determination involves information gleaned through diplomatic sources and channels, and a judgment premised in large part upon foreign policy. The grounds upon which the President would make such a designation are foreign considerations, foreign affairs and policy. Indeed it would seem

that such a restriction is in and of itself a foreign policy. It is at least an instrument of foreign policy." *Worthy* v. *Herter,* 270 F.2d 905, 910 (D.C. Cir. 1959), *cert. denied,* 361 U.S. 918 (1959).

Passport control was not designed solely as a protection for internal security. To adopt such thinking would be naive and unrealistic. So many phases of internal security are intertwined with foreign affairs in the administration of passport control that the two become inseparable. This area of government requires a joint-control effort of the Congress and the Executive, if the intended results are to be obtained. It is one where Congress legislates broad laneways of authority to the Executive, within which he must exercise his discretion in effectively administering that authority in a fast changing climate of world affairs.

Congress has provided that the Executive shall take all necessary steps short of an act of war to protect the rights and liberties of American citizens on foreign soil.[5] Certainly it is consistent with an overall policy that he should exercise that authority granted by law, to prevent incidents occurring in those countries, where normal diplomatic relations are non-existent. Those who would pursue this right of unlimited freedom to travel abroad at will, are those who would not hesitate to criticize their government for failing to protect them, if the need arose. This attitude is not dampened, even when such action could [fol. 69] jeopardize the foreign policy of the Nation. Personal vigilance to safeguard freedom should never be permitted to become a sword used for the destruction of the edifice it protests it is protecting.

In this case the authority of the Secretary of State is founded on two specific acts of the Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211(a) and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185.

22 U.S.C.A. § 211(a):

"The Secretary of State may grant and issue passports, . . . under such rules as the President shall designate and prescribe for and on behalf of the

United States, and no other person shall grant, issue, or verify such passports."

8 U.S.C.A. § 1185:

"(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President, or the Congress, be unlawful . . .

Citizens

"(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

On December 16, 1950, the President promulgated Presi- [fol. 70] dential Proclamation 2914,[6] which declared, for reasons therein set forth, the existence of a national emergency. This executive action preceded and was operative when Congress passed 8 U.S.C. § 1185. Thereafter, on January 17, 1953, pursuant to the foregoing legislation, the President reiterated the existence of the national emergency and accordingly issued a new Presidential Proclamation.[7] It is to be noted that not only did it promulgate the continued existence of the national emergency previously referred to in the earlier proclamation, but it pointed to the authority emanating from the Immigration and Nationality Act passed by Congress, which became law on

June 27, 1952, as the basis for executive action. This proclamation has never been rescinded or otherwise terminated. The existence of the national emergency still continues.

The House Judiciary Committee of the Congress had compiled for its use in 1958, all those provisions of law which had been brought into effect by the declaration of a national emergency by the President. It was again revised in 1962 and published as the "Report to the Committee on the Judiciary House of Representatives, 'Provisions of Federal Law in Effect in Time of National Emergency'." The foreword of the report prepared by the Committee's Chairman states:

> "The emergency proclaimed by the President in 1950 had not yet been terminated and the chronic state of international tensions made it clear that it would not be terminated in the foreseeable future. . . .
>
> "The heightened international tensions which developed in the latter part of 1961 created a new interest in the legal consequences of the actions which might be taken in the cold war by Congress or the President. In particular, there was substantial concern with knowing exactly what legislation would become effective upon the declaration of a national emergency by the President or Congress, or both."

[fol. 71] On Page 23, paragraph 6(c) of this report the statute presently in question, 8 U.S.C. § 1185 appears.

Presidential Proclamation 3004 specifically incorporated by reference the regulations previously prescribed by the Secretary of State and published under Title 22 of the Code of Federal Regulations §§ 53.1 to 53.9; and in addition it authorized the Secretary to revoke, modify or amend these regulations as he might find the interests of the United States to require. The applicable portions provide:

> § 53.1 "The term 'United States' as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 "No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 "No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) " . . .

(b) "When traveling between the United States and any country or territory in North, Central, or South America or in any island adjacent thereto: Provided, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: . . .

. . .

§ 53.8 "Nothing in this part shall be construed to prevent the Secretary of State from exercising the discre- [fol. 72] tion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries."

On January 16, 1961 the Secretary of State, pursuant to the authority contained in Presidential Proclamation 3004, amended 22 C.F.R. § 53.3(b) (1958) by Department Regulation 108.456, 26 F.R. 482 so as to provide:

§ 53.3(b) "When traveling between the United States any any country, territory or island adjacent thereto

in North, Central or South America, excluding Cuba: . . . "

Simultaneously, Public Notice 179 was publicized,[8] and the Department of State distributed Press Release No. 24[9] both of which promulgated more fully the purpose of the regulations and the administrative policy of the department in their application.

The issues in this case are clearly distinguishable from *Kent* v. *Dulles*, supra. The Court there held that these two statutes, 8 U.S.C. § 1185 and 22 U.S.C. § 211(a), did not authorize the Secretary to withhold passports of citizens, because of their beliefs or associations; and that the employment of such a standard could not be used to restrain the citizen's right of free movement.

> "We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." *Kent* v. *Dulles*, supra at 128.

[fol. 73]

> "The government *may* have the power to forbid the travel of all citizens to particular geographic areas because of war or national emergency. It does not have the power to restrain travel of citizens with whose politics it disagrees." Boudin (Plaintiff's counsel), *The Constitutional Right to Travel*, 56 Colum. L. Rev. 47, 74 (1956).

In the present case, Congress established by law the President's right to regulate and control passport visas within broad bounds of Executive discretion. There has been no claim of arbitrariness in the administration of these regulations. No passport has been claimed to have been denied, because of the applicant's personal beliefs, writings, character, race, religion, or the like. It does in fact bar the travel of all Americans to a specific geographi-

cal area. The mere fact that administratively all tourist travel is banned, while bona fide newspapermen and people with previous business interests in Cuba may be considered as eligible for travel is not an arbitrary criteria which would violate due process.

> "... (J)udicial review even of the formula of selection is narrow and it is limited to determining whether the basis of the choice bears some rational relationship to the ends to be served. The distinction made between news agencies with a demonstrated interest in foreign news coverage and individual reporters must have some relevance to the purpose to be achieved. . . .
>
> "The foreign policy considerations give the Secretary wide latitude in drawing a line and defining criteria." *Frank* v. *Herter*, 269 F.2d 245, 247-48 (D.C. Cir. 1959) (concurring opinion), *cert. denied*, 361 U.S. 918 (1959).[10]

The petitioner claims that if that power has been granted to the Executive pursuant to the law-making functions of Congress, the standards must be adequate to pass scrutiny [fol. 74] by the accepted tests. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 420-30 (1934).

> "'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.'" *Locke's Appeal*, 72 Penn. St. 491, 498, quoted in, *Field* v. *Clark*, 143 U.S. 649, 694 (1891).
>
> "But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense." *United States* v. *Grimaud*, 220 U.S. 506, 521 (1910).

To claim that Congressional statutes which authorize the Executive to make and administer regulations are not constitutional would destroy the theme of legislative action in multiple fields of accepted governmental regulations. The real test to be applied is whether or not the power delegated in this instance is under the circumstances, so vague, indefinite, and lacking in standards, as to constitute an unwarranted and illegal attempt to delegate to the Executive the Legislative power to make law.

The authority granted defined with general specificity the conditions under which the Executive was authorized to act. Both in time of war and upon the declaration by the President of a national emergency, when the President finds that the interests of the United States requires, may these restrictions on travel departure and entry be imposed. The time or term of their application is limited until the President or Congress shall otherwise order. All of the [fol. 75] conditions precedent established by law for the exercise of the power have been fulfilled.[11]

Government is much like a clock mechanism; in order to perform its functions effectively it must operate. To do so in this area of passport administration, which is so interrelated with foreign affairs, considerable discretion and elbow-room must be granted to the Executive.

> "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 324 (1936).

> "'It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. It is obviously impractical to appeal to Congress for fur-

ther legislation in each new emergency. Swift Executive action is the only effective counterstroke.'" *Report of the House Committee on Foreign Affairs*, H.R. Rep. No. 485, 65th Cong., 2d Sess. 2-3, quoted in *Kent* v. *Dulles*, supra at 133 (Clark, J., dissenting).

That part of the plaintiff's prayer for relief which requests that the criminal enforcement provisions of 8 U.S.C. § 1185(c) be enjoined is not warranted. The law complained of is not in contravention to the Federal Constitution. There are no grounds upon which this Court would be justified in interfering with the criminal enforcement aspects of this statute.

[fol. 76]

"The duty to enforce the criminal law is vested by the Constitution not in the judicial arm of the government but in the executive. . . . It would be an improvident trespass upon the separation of the powers, if not a complete usurpation of power, were the court to grant immunity in advance of an actual transaction." *International Longshoremen's Ass'n.* v. *Seatrain Lines, Inc.*, 212 Fed. Supp. 653, 656 (S.D.N.Y. 1963), *rev'd on other grounds*, Docket No. 28471, 2 Cir., Jan. 27, 1964.

"The court of equity has at times been called upon to enjoin the enforcement of a criminal prosecution. The rule has been firmly established that it will *not* ordinarily intervene to enjoin the enforcement of the law by the prosecuting officials. . . . unless under proper circumstances there would be irreparable injury, and the sole question involved is one of law . . . where a clear legal right to the relief is established." *Reed* v. *Littleton*, 275 N.Y. 150, 9 N.E.2d 814, 815-16 (1937).

Therefore, the plaintiff's motion for summary judgment is denied; defendants' motion for summary judgment is granted. So ordered.

T. Emmet Clarie, United States District Judge.

I concur in part and dissent in part, with opinion.

J. Joseph Smith, United States Circuit Judge.

I concur in part and dissent in part, with opinion.

M. Joseph Blumenfeld, United States District Judge.
February 20, 1964.

[fol. 77] [1] See p. 14 *infra*.

[2] *Porter* v. *Herter*, 278 F.2d 280 (D.C. Cir. 1960), *cert. denied*, 361 U.S. 918 (1959); *Worthy* v. *Herter*, 270 F.2d 905 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 918 (1959); *Frank* v. *Herter*, 269 F.2d 245 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 918 (1959).

[3] (a) Immigration and Nationality Act of 1952 § 215, 66 Stat. 163, 190, 8 U.S.C. § 1185 (1952).

(b) On October 3, 1962, the Congress passed a joint resolution stating that the United States is determined, *inter alia*: ". . . to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere. . . ." 76 Stat. 697.

[4] (a) In March of 1963, President Kennedy participated in a conference with the Presidents of the five Central American Republics and Panama. A result of this conference was the Declaration of Costa Rica a passage of which is quoted below:

> "The Presidents agree that Ministers of Government of the seven countries should meet as soon as possible to develop and put into immediate effect common measures to restrict the movement of their nationals to and from Cuba, and the flow of material, propaganda and funds from that country.
>
> "This meeting will take action, among other things, to secure stricter travel and passport controls, including appropriate limitations in passports and other travel documents on travel to Cuba. Cooperative arrangements among not only the countries meeting here but also among all OAS members will have to be sought to restrict more effectively not only those movements of people for subversive purposes but also to prevent insofar as possible the introduction of money, propaganda, materials, and arms. Arrangements for additional sea and air surveillance and interception within territorial waters will be worked out with cooperation from the United States." 48 Dept. State Bull. 511, 517 (April 8, 1963).

(b) Pursuant to the agreement entered into in Costa Rica, a meeting of the Ministers of Government took place in April of 1963 at Managua, Nicaragua. Resolution I of that meeting is significant to the instant matter:

"The meeting of Ministers of Government, Interior and Security convoked pursuant to the pertinent section of the Declaration of Central America signed by the Presidents of the seven countries in San Jose, Costa Rica on March 19, 1963

[fol. 78] AGREES

"To recommend to their Governments that they adopt, within the limitations of their respective constitutional provisions, measures to be put into effect immediately, to prohibit, restrict and discourage the movement of their nationals to and from Cuba. To this end, they propose the adoption of the following measures:

"1) Provide, as a general rule, that every passport or other travel document which may be issued carry a stamp which indicates that said passport is not valid for travel to Cuba.

"2) Declare officially that nationals who are permitted to travel to Cuba should have the permission duly inscribed in their official travel document.

"3) Promulgate regulations restricting the granting of visas to foreigners who have travelled to Cuba within a stipulated period of time.

"4) Notify travel agencies and transport companies of these measures for due compliance; and inform the governments of other countries through the most appropriate means.

"5) Request the Governments of the Hemisphere:

"(a) Not to allow the nationals of signatory countries to travel to Cuba unless they possess a valid passport or other document issued by their country of origin valid for such travel;

"(b) Not to accept visas, tourist cards or other documents issued to their nationals for travel to Cuba which do not form an integral (non-detachable) part of their passports or other travel documents;

"(c) To observe the limitations placed in the passports or other travel documents of the nationals of signatory governments and not allow them to depart for Cuba;

"(d) To inform the signatory countries through appropriate channels of refusal to allow one of their nationals to depart for Cuba; and

"(e) To provide the signatory governments the names of their nationals which may appear on the passenger list of any

airplane or ship going to or coming from Cuba." 48 Dept. State Bull. 719 (May 6, 1963).

[fol. 79] (c) "Embargo On All Trade With Cuba," Proc. No. 3447, 76 Stat. 1446, U.S. Code Cong. and Adm. News 1962, p. 4173.

(d) "Interdiction of the Delivery of Offensive Weapons to Cuba," Proc. No. 3504, 27 F.R. 10401, U.S. Code Cong. and Adm. News 1962, p. 4241.

(e) "Cuban Assets Control Regulations," 31 C.F.R. 515.201 (Supp. 1963).

[5] 22 U.S.C.A. § 1732: "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

[6] Proc. No. 2914, 64 Stat. A454.

[7] Proc. No. 3004, 67 Stat. C31:

"WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

"WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

"WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

"WHEREAS the exigencies of the international situation and [fol. 80] of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

"NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

"1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9 inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

"2. . . . .

"3. . . . .

"4. . . . .

"5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of Section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

[fol. 81] "To the extent permitted by law, this proclamation shall take effect as of December 24, 1952."

[8] It read:

"In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

"Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 USC 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

"Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked." 26 Fed. Reg. 492.

[9] It read:

"The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

"The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

"Permanent resident aliens cannot travel to Cuba unless [fol. 82] special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

"Federal regulations are being amended to put these requirements into effect.

"These actions have been taken in conformity with the Department's normal practice of limiting travel to those coun-

tries with which the United States does not maintain diplomatic relations." Press Release No. 24.

[10] It is significant to consider, in addition to the statutes in issue in the present case, the basic grant by Congress of power to the Secretary of State. 5 U.S.C.A. § 156: "The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the department, and he shall conduct the business of the department in such manner as the President shall direct."

[11] See *supra* note 7.

[fol. 83]

SMITH, Circuit Judge, concurring in part, dissenting in part.

I agree with Judge Clarie that a three judge court has jurisdiction, for the case sufficiently calls into question the constitutionality of the statutes relied upon by the Executive to sustain the regulations embodying area restrictions on the issuance of passports. If §211(a) of the Passport Act of 1926, 22 U.S.C. §211(a) (1958), the sole statute cited in the regulations as a statutory basis, is construed at face value as a delegation of discretionary power to the Executive to impose restrictions on the issuance of passports to American citizens, it poses a problem of invalid delegation, for there are no standards in the statutory language, legislative history, or administrative practice. Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171, 192 (1952).

However, I am unable to find in either §211(a) of the Passport Act of 1926 or in §215 of the Immigration and Nationality Act of 1952, 8 U.S.C. §1185 (1958), any basis for the area restrictions in the regulations proclaimed by the State Department. Neither act was designed to meet the present problem. Section 211(a) is nearly identical with the original passport act, 11 Stat. 60 (1856), which was intended to preserve proper respect for American passports by centralizing their issuance in the Federal Government. A number of foreign governments had refused to

recognize American passports that were being issued by local magistrates and officials. At that time no passport was necessary to travel abroad, and Congress hardly intended this statute to authorize the Executive to restrict travel. See Boudin, *The Constitutional Right to Travel*, 56 [fol. 84] COLUM. L. REV. 47, 52-53 (1956); Comment, *Passport Refusals for Political Reasons*, supra; Note, 41 CORN. L.Q. 282 (1956). See also, ASSOC. OF THE BAR OF THE CITY OF N.Y., FREEDOM TO TRAVEL 6-7 (1958). Section 215 of the Immigration and Nationality Act of 1952 was designed to control entry and exit over our borders in time of national emergency by preventing arrival or departure without a valid passport.

Since the right to travel is constitutionally protected, some clear grant of power to curtail it must exist before any infringement of the right to travel is upheld. As the Supreme Court put it in *Kent* v. *Dulles*, 357 U.S. 116, 129 (1957):

> "Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case. But there is more involved here. In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than 'request all whom it may concern to permit safely and freely to pass, and in the case of need to give all lawful aid and protection' to this citizen of the United States. But that function of the passport is subordinate. Its crucial function today is control over exit. . . . [T]he right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of Congress . . . And if that power is to be delegated, the standards must be adequate to pass scrutiny by the accepted tests."

Where constitutional rights are restrained, *Kent* v. *Dulles* requires that we be reluctant to imply a broad grant of power by implication from statutes not clearly designed for the purpose. Hence the Supreme Court construed §211(a) and §215 narrowly to grant the Executive the power to deny a passport on only two grounds: (1) lack of proof of citizenship and allegiance to the United States and (2) [fol. 85] the participation in illegal conduct. "We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, [211(a)] was adopted, the administrative practice, so far as relevant here, had jelled only around the two categories mentioned. We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." 357 U.S. at 128. If the statutes are to be construed narrowly to preserve individual rights and to avoid constitutional doubts, they cannot be read as the majority read them as granting to the Secretary of State the power to restrict travel to certain foreign areas for any substantive reason he may choose.

Even if one adopts the view of the four dissenters in *Kent* v. *Dulles*—that the legislative history of the predecessors of §215 and the administrative practice indicated Congressional intent to permit the Secretary of State to exercise his discretion to deny passports to those whose travel might endanger the internal security of the United States —there is no finding that travel to Cuba by Zemel or those similarly situated would endanger the internal security of the United States. Moreover, the language of §215 says nothing about empowering the Secretary of State to restrict travel to certain foreign areas. Rather it says that no citizen shall attempt to enter or leave the United States in time of national emergency without a valid passport. It requires a truly remarkable feat of judicial gymnastics to construe this statute narrowly as a grant of power to [fol. 86] invalidate passports for travel to certain coun-

tries. The regulations themselves did not purport to be based on §215.

I do not understand the majority to adopt the approach of the District of Columbia Court of Appeals in *Worthy* v. *Herter*, 270 F. 2d 905 (1959), cert. denied 361 U.S. 918 (1959), which found the power of the Secretary of State to impose area restrictions inherent in the Executive's plenary power over foreign affairs. *Kent* v. *Dulles* implicitly rejected the notion that the Executive had inherent constitutional power to curtail individual freedom to travel abroad. If such inherent power existed, what would be its bounds? Could travel to France be curtailed if the Executive decided that foreign policy required such curtailment to impose sanctions because of De Gaulle's recent recognition of Red China? If so, it is easy to see how "such executive power could, by increasing the number of nations to which travel is excluded while expanding the excepted class of persons for whom travel to such nations is permitted, approach the absolute discretionary control over travel held without warrant in the Constitution by the *Kent* decision." Note, 73 HARV. L. REV. 1610, 1611 (1960).

But the majority seem to suggest that passport control is so intertwined with foreign affairs that Congress must have legislated the Executive "broad laneways of authority." Rather dubious support for this proposition is sought from 22 U.S.C. §1732 (1958), which requires the President to take steps short of war to secure the release of Americans imprisoned abroad. Still, the entire approach flies in the teeth of the language of *Kent* v. *Dulles*—"Where activities or enjoyment, natural and often necessary to the [fol. 87] well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." 357 U.S. at 129.

We do not pass here on the desirability of area restrictions on travel. I should think Congress might well be justified in this period of international tensions produced by the Cold War in authorizing curtailment of travel to an actively unfriendly nation such as Cuba. It is entirely unrealistic to pretend that there was an end to emergency because of the Korean armistice. However, it is up to

Congress to determine that conditions require a dilution of the freedom to travel through area restrictions on passports. See *Korematsu* v. *United States*, 323 U.S. 214 (1944), where the Supreme Court upheld the use of the war power to restrict the freedom of movement of citizens of Japanese origin after a Congressional determination of "the greatest imminent danger to the public safety." Cf. *Flynn* v. *Rusk*, 219 F.Supp. 709 (D.C.D.C. 1963); *Mayer* v. *Rusk*, 32 L.W. 2274 (D.C.D.C. 1963) (on appeal to the Supreme Court, Dkt. 746). The problem here is that as yet Congress has made no determination that there is an overriding need for area restrictions. After the Supreme Court's decision in *Kent* v. *Dulles*, President Eisenhower made a special request to Congress for legislation authorizing the Secretary of State, subject to substantive and procedural safeguards, to deny passports to persons whose travel would be inimical to the security or foreign relations of the United States and to impose restrictions on the use of passports by Americans for travel to areas where their presence might conflict with foreign policy objectives. Special Message of July 7, 1958, 104 CONG. REC. 11849, 3 U.S. CODE CONG. & ADMIN. [fol. 88] NEWS 5465, 85th Cong., 2nd Sess. (1958). While legislation making it unlawful for members of Communist organizations to be issued passports has been passed, none of the several bills introduced in recent years to authorize area restrictions on passports has been enacted. *E.g.*, H.R. 13318, 85th Cong., 2nd Sess.

I would hold that such legislation is necessary, for the regulations cannot be supported by the existing statutes, inherent executive power, or by any executive agreement. Even if we assumed that constitutional rights could be overridden by an executive agreement, the Managua Resolution of April 3, 1964 was not an executive agreement. The ministers of the seven nations present agreed only to recommend to their governments the adoption, "within the limitations of their respective constitutional provisions," the restriction and discouragement of the movement of their nationals to Cuba. Area restrictions may be necessary and desirable, but Congress should take the responsibility for authorizing them after a full fact-finding inquiry.

Therefore, I would hold that the present statutes do not authorize area restrictions on travel and that the Executive cannot restrict the right to travel without specific statutory authority. I respectfully dissent from the denial of a declaratory judgment to that effect. I dissent not because I disapprove of the ends sought by the area restrictions imposed thus far, but because these restrictions are based on a claimed power whose limits are vague and undefined and whose source I cannot specify.

While I disagree, as indicated, with the view that the area restrictions are authorized, and would grant a declaratory judgment that they are not, I would dismiss the action as against the Attorney General as at best premature.

[fol. 89]

BLUMENFELD, District Judge, concurring in part, dissenting in part. I dissent on the ground that this is a case for a district court of one judge.

Jurisdiction

The plaintiff brings this action for an injunction to force the Secretary of State to validate his passport for travel to Cuba. The Secretary bases his refusal on existing State Department regulations.

We are confronted with a threshold question of jurisdiction. The question is whether this is a proper case for convening a three-judge court.

The recent per curiam opinion of the Supreme Court in *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715, 82 S. Ct. 1294, 8 L. Ed. 2d 794 (1962), sets forth the tests which a district court should apply to determine whether a three-judge court is required:

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

There is no doubt that the constitutional question is not plainly insubstantial, see *Bailey* v. *Patterson*, 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962), for in *Kent* v. *Dulles*, 357 U.S. 116, 130, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958), the Supreme Court said: "To repeat, we deal here with a constitutional right of the citizen, a right which we must [fol. 90] assume Congress will be faithful to respect." And, a basis for equitable relief is alleged.

But, the case does not "otherwise come[s] within the requirements of the three-judge statute," which reads:

Section 2282 of Title 28:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Here, we are not directly and immediately confronted with the question whether either of the statutes, §211a or §1185, by their terms forbid granting to the plaintiff a passport validated for travel to Cuba. The plaintiff himself conceives that his position in this court is to "properly sue to protect his constitutional rights by alleging that the statute relied upon by the administrative agency does not support the action taken by it, and that *if it does* it is unconstitutional." Brief for Plaintiff, p. 5 (emphasis added).

This analysis is fairly derived from his specific prayer for relief:

> "(c) Decreeing that the defendant Secretary of State's restrictions upon travel to Cuba, as embodied in his public announcement of January 16, 1961, Press Release No. 24, in Public Notice 179, 26 F.R. 492, and in Departmental Regulation 108.456, 26 F.R. 482-483, are invalid, without any authority in law, and are unsupported by the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211a, or by Section 215 of the Immigration and

Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185, or by Proclamation 3004, 18 F.R. 489." (Plaintiff's Amended Complaint, p. 7)

[fol. 91] The Supreme Court in *Kent* v. *Dulles*, 357 U.S. at 129-30, treated §1185(b) *pari passu* with §211a, although the defendant expressly disclaims reliance upon it here as a source of authority for the regulation excluding travel to Cuba.

The focal point of the plaintiff's attack is clearly upon the regulation itself. "But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the Congressional scheme of §266 . . . In other words it [the plaintiff] seeks a restraint not of a statute, but of an executive action." [1] *Phillips* v. *United States*, 312 U.S. 246, 252, 61 S. Ct. 489, 85 L. Ed. 800 (1941).

There is no logical escape from the proposition that whenever a regulation is held invalid it must mean either that the statute did not authorize the regulation or that the statute in so authorizing it is unconstitutional. In that event, the constitutional question is always reserved for secondary determination. The court's general doctrine of avoiding constitutional questions whenever possible, see *United States* v. *Rumely*, 345 U.S. 41, 45, 73 S. Ct. 543, 97 L. Ed. 770 (1953), is not without significance in determining whether the special three-judge court procedure should be invoked. The decision in *Phillips* v. *United*

[fol. 92] that an attack upon a state statute was too remote to be cognizant for the procedural purposes of §2281 tested by applying the principles set forth by Mr. Justice Cardozo in *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 116-18, 57 S. Ct. 96, 81 L. Ed. 70 (1936), to differentiate between stages of adjudication at which issues are reached would seem to compel a like determination here. See *Kesler* v.

[1] Section 266 is the predecessor of §2281 and, although it deals with constitutionality of state statutes, it is fully applicable as in the respect here pertinent it in no way differs from §2282.

Dept. of Public Safety, 369 U.S. 153, 158, 82 S. Ct. 807, 7 L. Ed. 2d 641 (1962).

We are not being asked to test the statute against the Constitution; we are being asked to test the departmental regulations. But a regulation is not an "Act of Congress." As *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 173, 59 S. Ct. 804, 83 L. Ed. 1189 (1939), points out, §2282 does not refer to "an order made by an administrative board or commission" as does §2281 relating to action by states, but confines its requirement for a three-judge court "to cases of attack upon an 'Act of Congress' upon the ground that 'such Act or any part thereof is repugnant to the Constitution of the United States.'"

The fact that we deal with a constitutional right of a citizen does not mean that the validity of every claimed interference with it must be litigated before a three-judge court. A contrary conclusion is not compelled by a sentence in Mr. Justice Whittaker's opinion in *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 76-7, 80 S. Ct. 568, 4 L. Ed. 2d 568 (1960), that a three-judge court is required whenever a substantial constitutional question is alleged.[2] The [fol. 93] statutes identified by the plaintiff, §211a and §1185, present no more of an immediate clash between the Act and the Constitution here than they did in *Kent* v. *Dulles*, where the court in openly failing to reach the question of the constitutionality of the same statutes which the plaintiff claims are involved here, said:

> "We would be faced with important constitutional questions were we to hold that Congress by §1185 and §211a had given the Secretary authority to withhold passports

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[2] That statement was made in a special context to refute a claim that a proper reading of §2281 limits the requirement of a three-judge court to cases where the constitutional claim is the *sole* claim before the court. It would be in point here only if the defendant sought to defeat three-judge court jurisdiction on the ground that the plaintiff had destroyed pristine applicability of §2282 by alternately raising the question whether the President had a right, apart from an Act of Congress, to impose area restrictions reasonably related to the control of foreign relations inherent in the President's plenary power over foreign affairs.

to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement." (357 U.S. at 130)

If the Supreme Court did not reach the question whether the same acts of Congress were repugnant to the Constitution in *Kent* v. *Dulles*, our exercise of jurisdiction as a three-judge court would be to permit the plaintiff in this case to wag the dog of a direct route to review by the Supreme Court simply by grasping the tail of a bare allegation of unconstitutionality of a statute and a prayer for an injunction.

Examination of *Flynn* v. *Rusk*, 219 F. Supp. 709 (D.D.C. 1963), appeal pending, in which a three-judge district court [fol. 94] was convened, cited by the plaintiff, Brief for Plaintiff, p. 10, discloses a challenge to the constitutionality of the Subversives Control Act of 1950, 64 Stat. 998, 50 U.S.C. 785 (1958), which on its face and in specific terms forbids any member of a communist organization to make application for or use or attempt to use a passport. In *Bauer* v. *Acheson*, 106 F. Supp. 445 (D. D. C. 1952), a case essentially the same as ours, upon which the plaintiff also relies, the misgivings of Circuit Judge Fahy over the lack of jurisdiction of a three-judge court led him to dissent, stating:

"In my view therefore the case is one for the usual district court composed of a single judge, with right in the parties to appeal from his decision to the Court of Appeals, followed by right of petition to the Supreme Court for review on writ of certiorari. This litigation should not be deemed within the special class of cases committed by Congress to a specially constituted three-judge court, properly convened only when a substantial question is raised as to the constitutionality of an Act of Congress the enforcement, operation or execution of which is sought to be enjoined, with right of direct appeal to the Supreme Court. 28 U.S.C. §2282, supra. *Plaintiff in the end seeks at most to enjoin action of the Secretary which might be in-*

valid because not in conformity with the proper construction of the statute under which he acts. She raises, and there is involved, no substantial question as to the constitutionality of the statute." (106 F. Supp. at 454) (emphasis added)

That *Kent* v. *Dulles* was considered and decided on the merits by the Supreme Court without suggestion that a three-judge court should have been convened cannot be regarded as an omission by it to notice the route by which the case came before it, for as stated in *Kesler* v. *Dept. of Public Safety*, in Mr. Chief Justice Warren's dissenting [fol. 95] opinion:

"The question is whether a three-judge court was properly convened for the trial of this case. Although the issue was not considered by the courts below, and has not been raised by the parties here, it is our duty to take independent notice of such matters and to vacate and remand any decree entered by an improperly constituted court." (369 U.S. at 175)[3]

However the situation might be, if regarded solely on the authority of *Bauer* v. *Acheson*, we now know that the Supreme Court did not deem an action to enjoin the Secretary of State from refusing to grant a passport on the basis of regulations promulgated under §211a to require the invocation of a three-judge court. Furthermore, in none of three separately considered appeals from summary judgments for the Secretary of State in cases not distinguishable from this one, rendered by a single judge district court after *Kent* v. *Dulles* was decided did the Court of Appeals for the District of Columbia Circuit[4] make any suggestion

[3] This portion of the dissenting opinion did not divide the justices, see 369 U.S. at 155, who rather focused on the question whether an immediate issue of constitutionality was presented. *Id.* at 157.

[4] Six of the eight circuit judges who had sat en banc on *Kent* v. *Dulles*, *sub nom. Briehl* v. *Dulles*, 248 F. 2d 561 (D.C. Cir. 1957), were equally distributed on three separate panels who upon review affirmed single judge district court determinations that state department regulations imposing area restrictions upon passports were valid.

that a three-judge court should have been convened. *Worthy* v. *Herter*, 270 F. 2d 905 (D.C. Cir.) cert. denied 361 [fol. 96] U.S. 918 (1959); *Frank* v. *Herter*, 267 F. 2d 245 (D.C. Cir.), cert. denied 361 U.S. 918 (1959); *Porter* v. *Herter*, 278 F. 2d 280 (D.C. Cir. 1960), cert. denied 361 U.S. 918 (1959).

In my opinion, a three-judge court was improvidently invoked.

Merits

I would deny plaintiff's motion for summary judgment and grant the Secretary of State's motion for summary judgment. For reasons which are set forth at the close of this opinion, I would dismiss the action against the Attorney General.

In the event it should hereafter be decided that this case should be determined by the action of a district judge, it is appropriate that I briefly express my views on the merits.

The statute, §211a, has placed the authority to issue passports in the Secretary of State "under such rules as the President shall designate for and on behalf of the United States." One of those rules provides: "The Secretary of State is authorized in his discretion . . . to restrict it [a passport] against use in certain countries. . . ." 22 C.F.R. §51.75 (1949). Under a claim of authority thus derived from §211a, the Secretary imposed a restriction upon travel to Cuba on January 16, 1961, Public Notice 179. Plaintiff's contention that the purpose of §211a was merely to centralize a ministerial duty to issue passports solely in the [fol. 97] Secretary of State ignores the long standing view "that the issuance of passports is 'a discretionary act' on the part of the Secretary of State." *Kent* v. *Dulles*, 357 U.S. at 124-25. While the Supreme Court held that the Secretary of State does not have "unbridled discretion to grant or withhold", *Id.* at 129, a passport, §211a was not given such a restricted construction as that for which the plaintiff contends. When the Supreme Court in *Kent* v. *Dulles* rejected the Secretary's argument that long continued executive construction prior to the 1926 enactment of §211a warranted the inference that he had discretion to

deny a passport on the ground of personal beliefs and associations of a citizen, it pointed out that the scattered rulings affecting communists were insufficient and that the administrative practices which had "jelled" in two categories relating to allegiance and criminal activity were not relevant. But in rejecting the probative value of some and the relevancy of other prior administrative practices to establish that Congress had adopted an interpretation of discretion that embraced the right to deny a passport on the ground of beliefs of a citizen, the Supreme Court did not decide that the Secretary's discretion to deny passports was limited to only those categories which had jelled. The Court went no further than to "hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him *unbridled discre-*
[fol. 98] *tion* to grant or withhold a paassport for *any* substantive reason he may choose." *Id.* at 128 (emphasis added). It was reiterating what it had already said about discretion: "But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion." *Id.* at 125. The point of *Kent* v. *Dulles* is that the exercise of discretion by the Secretary is subject to judicial scrutiny. See also *Shachtman* v. *Dulles*, 225 F. 2d 938, 940 (D.C. Cir. 1955). Although the criteria for measuring the Secretary's discretion have not been determined other than it may not be "unbridled", the fact that Congress gave it to the Executive indicates that it is to be exercised in relation to his powers to conduct foreign affairs. See *Shachtman* v. *Dulles*, 225 F. 2d at 941-42. It is plain to see that Congress was thinking primarily of the recognized power of the President to conduct foreign affairs when through §211a it placed the exclusive authority to issue passports in *the Secretary of State*, the arm of the President in conducting foreign affairs, under "such rules as *the President* shall designate and prescribe *for and on behalf of the United States*, . . ." (Emphasis added). Travel to other nations is at least one facet of foreign affairs.

Plaintiff's claim that § 211a is an unconstitutional delegation of power has no merit. The role of delegation is

governed not only by the conditions surrounding the particular problem in this case, but by general premises underlying the conduct of foreign affairs, the critical phases of [fol. 99] which have always been entrusted to the President and his Secretary of State. The scope and pace of foreign affairs in the condition of the world today would make it impossible for Congress to act without delegation. Where, as here, Congress seeks to implement presidential power, standards other than a reasonable connection to the conduct of foreign affairs are not necessary to constitutionality of the delegating act. *Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 68 S. Ct. 431, 92 L. Ed. 568 (1948); See *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936). There is no need to consider whether it would fall within the scope of the President's inherent powers. But see *Worthy* v. *Herter*.

Although passports are sometimes the subject matter of treaties with other nations, the treaty power may include the power to exclude aliens but not the power to impose travel restrictions upon our own citizens. Treaty powers cannot be used to regulate matters which are purely of domestic concern. See *Power Authority of New York* v. *FPC*, 247 F. 2d 538 (D.C. Cir.), remanded with direction to dismiss as moot, 355 U.S. 64 (1957).

The question then is whether the Secretary of State through the exercise of the discretion vested in him by the President pursuant to the power delegated by Congress in § 211a may restrict travel to a country with which the United States has broken off diplomatic relations.

[fol. 100] The conduct of our relations with other nations is the primary responsibility of the President. *United States* v. *Curtiss-Wright Export Corp.* In particular, the President has the exclusive power to determine whether to recognize a foreign government and whether to initiate and maintain diplomatic relations. *United States* v. *Pink*, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942). This is not a case like *Kent* v. *Dulles*, where the passports were denied to certain citizens because of their beliefs and associations. Rather it designates certain parts of the world forbidden to all American travelers. This can hardly be

regarded as arbitrary or capricious by this plaintiff. Cf. *Perkins* v. *Elg*, 307 U.S. 325, 350 59 S.Ct. 884, 83 L. Ed. 1320 (1939). It relates not to internal security, but to foreign affairs.

The refusal to validate plaintiff's passport for travel to Cuba relates to an exercise of the power to conduct foreign affairs which the Chief Executive already has and is well within the discretion given to the Secretary by the President. The amply sufficient reasons published by the Secretary for the promulgation of the regulation which curtails the plaintiff's right to travel to Cuba were starkly emphasized when this government confronted the Soviet Union with a demand to remove the missiles it had previously brought to Cuba only a few weeks before Zemel began this suit.

I am not inhibited in reaching this result by constitutional considerations, for I believe that the restrictions on the [fol. 101] right to travel that is involved here is a valid one. "The gravest imminent danger to the public safety" is required in order to justify the exclusion of persons from their homes, *Korematsu* v. *United States*, 323 U.S. 214, 218, 65 S. Ct. 193, 89 L. Ed. 194 (1944), and perhaps a similar showing must be made in order to justify the confinement of a citizen within the boundaries of this country. *Kent* v. *Dulles*, 357 U.S. at 128. But the right to travel is properly subject to a reasonable prohibition on travel to a particular foreign country which our government believes to be so unfriendly to this nation as to require the severance of diplomatic relations with it. I do not regard the plaintiff's right to see for himself what was happening in Cuba to be of so exalted a nature that it cannot be subjected to restraint during a period when the State Department predicts that such travel might provoke international incidents which would necessitate negotiations, see 22 U.S.C. § 1732 (1958), with a government whose existence the United States is committed to ignore.

It remains to consider plaintiff's claim that § 1185 does not authorize prosecution for violation of an area restriction contained in a passport. Apart from the fact that the Secretary expressly disclaims reliance upon it, that statute is concerned solely with the imposition of sanctions for passport violations, and does not undertake to create pass-

port disqualification limitations. *Briehl v. Dulles*, 248 F. 2d 561, 581 (D.C. Cir. 1957) (Bazelon, J. dissenting), rev'd [fol. 102] *sub. nom. Kent* v. *Dulles*, 359 U.S. 116 (1958). Since the area restriction in question is a reasonable regulation of the plaintiff's right to travel, the plaintiff's only interest in having the statute construed is to determine whether he may violate a valid restriction without risking sanctions which § 1185 imposes for entry or departure from the United States contrary to its provisions. This is not a sufficient interest to require a construction of § 1185 before it is raised in a criminal proceeding. *Pauling* v. *Eastland*, 288 F. 2d 126 (D.C. Cir.), cert. denied, 364 U.S. 900 (1960); See *ILA* v. *Seatrain Lines, Inc.*, 212 F. Supp. 653 (S.D. N.Y. 1963), rev'd on other grounds, Docket No. 28471, 2 Cir., Jan. 27, 1964.

[fol. 103] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 9549

LOUIS ZEMEL, Plaintiff,

vs.

DEAN RUSK, Secretary of State, Department of State, and ROBERT F. KENNEDY, Attorney General, Defendants.

JUDGMENT—March 2, 1964

The above-entitled case having come on to be heard before a three-judge District Court pursuant to the provisions of 28 U.S.C. §§ 2282 and 2284, with all parties appearing by counsel, and the issues having been duly considered and determined by the said Court in its "Memorandum of Decision" filed on February 21, 1964,

It is Accordingly Ordered, Adjudged and Decreed, as follows:

(1) That the motion for summary judgment filed by plaintiff be and is hereby denied;

(2) That the motion for summary judgment filed by Dean Rusk, Secretary of State, be and is hereby granted;

(3) That judgment be and is hereby entered dismissing the action on the merits as against Robert F. Kennedy, Attorney General; and,

(4) That the defendants have and recover from plaintiff their costs in the action.

[fol. 104] Dated at New Haven, Connecticut, this 2nd day of March, 1964.

Gilbert C. Earl, Clerk, United States District Court.

[fol. 105] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
Civil Action No. 9549

LOUIS ZEMEL, Plaintiff,

—against—

DEAN RUSK, Secretary of State, Department of State, and ROBERT F. KENNEDY, Attorney General, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed March 17, 1964

I. Notice is hereby given that Louis Zemel, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the judgment denying the plaintiff's motion for summary judgment and for a permanent injunction, granting the motion for summary judgment of the defendant, Dean Rusk, Secretary of State, and dismissing the action on the merits as against Robert F. Kennedy, Attorney General, which judgment was dated and entered in this action the 2nd day of March, 1964.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record of this action, including this notice of appeal.

[fol. 106] III. The following questions are presented by this appeal:

(1) Whether Section 1 of the Passport Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. §211a and Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. §1185 are constitutional on their face and as applied to appellant.

(2) Whether the Secretary of State has been authorized by Congress or has inherent executive power to prohibit travel to Cuba.

Dated, March 16, 1964

Rabinowitz & Boudin, By Leonard B. Boudin, Member of Firm, 30 East 42nd Street, New York 17, New York;

Gruber & Turkel, 322 Main Street, Stamford, Connecticut,

Attorneys for Louis Zemel, Plaintiff and Appellant.

[fol. 107] Proof of Service (omitted in printing).

[fol. 109] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 110]

SUPREME COURT OF THE UNITED STATES

No. 86—October Term, 1964

LOUIS ZEMEL, Appellant,

vs.

DEAN RUSK, Secretary of State, et al.

Appeal from the United States District Court for the District of Connecticut.

ORDER POSTPONING JURISDICTION—October 12, 1964

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.